SUPREME COURT, U.S.

No. 873

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Supreme Court of the United States

On Certiorari to the United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA

—against—

JOSEPH COLOZZO,
Defendant-Appellant.

PETITION FOR CERTIORARI

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—against—

JOSEPH COLOZZO,

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Joseph Colozzo hereby petitions for writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit.

I

The memorandum of the Court of Appeals is not reported. It is appended hereto.

II

The order sought to be reviewed was entered in the Court of Appeals on October 25, 1966. Jurisdiction to review the order by writ of certiorari is conferred on this Court by Title 28, United States Code, section 1254(1).

III

The questions presented for review are:

(1) Whether the Court of Appeals has jurisdiction, under the doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S.

541 (1949), to review an order of the District Court denying defendant's motion indefinitely to stay the trial of a criminal case when defendant, in support of his motion, offered the uncontradicted opinion of three physicians either employed by the Government or appointed by the District Court to the effect that if defendant were to undergo a trial it was likely that he would die of a heart attack?

(2) Whether the Court of Appeals, in these circumstances, properly denied defendant's motion for leave to file a petition for a writ of mandamus?

IV

This case involves Title 28, United States Code, section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

V

On February 2, 1962, the Government filed an information in the United States District Court for the Eastern District of New York, charging Joseph Colozzo (and another not here involved), in three counts, with making false statements on certain labor union reports in violation of Title 29, United States Code, sections 431(a) and 439(b). These crimes are misdemeanors.

From time to time thereafter, the case was called on the trial calendar of the District Court. On each occasion, defendant applied for an adjournment or an indefinite delay of the trial on the ground that his medical condition was too poor to permit him to undergo the rigors of a trial.

Various affidavits and certificates were filed by defendant's personal physicians. Each of them reported, in essence, that defendant's health (and particularly his cardiac condition) made it dangerous for him to undergo a trial.

Of perhaps greater significance is the fact that defendant has several times been examined by physicians appointed by the District Court or employed by the Government.

In October, 1962, the District Court appointed Dr. George H. Roberts to examine defendant (432)*. Dr. Roberts reported to the Court that he had examined defendant, that defendant was suffering from coronary disease, and that he had been so afflicted for the preceding three years. (In short, defendant had been ill for more than two years prior to the filing of the instant information.) Dr. Roberts concluded that defendant was "unable, because of his heart disease, to properly prepare his defense or to participate in it in a trial. His present problem is one of survival in life . . ." (444).

On July 23, 1964, Dr. Roberts made a supplementary report, in which he stated that he had consulted about defendant with a distinguished cardiac specialist and that, if anything, since 1962, defendant's condition had worsened (445-47).

On September 27, 1965, the District Court ordered defendant committed to the United States Public Health Service Hospital on Staten Island for intensive physical examination (436). That institution reported that defendant had been hospitalized, that he was a "class IV cardiac [the most severe classification] with significant disability"

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* References are to the original record as docketed in the Court of Appeals.

(449), that defendant should "be restricted to sedentary activities only," and that he "cannot prepare a defense and stand trial without danger to his health and life" (452).

On February 19, 1966, the District Court appointed Dr. Abraham G. Cohen to examine defendant. Dr. Cohen reported that he concurred in the diagnosis of the Public Health Service Hospital, and that defendant's "participation in trial proceedings could prove extremely hazardous to his health and life" (458).

On this record — in which the doctors unanimously agreed that a trial would endanger defendant's life, and in which no contrary medical testimony of any kind had been adduced — defendant moved for an adjournment of the trial. The District Court ruled on the motion by making its order of April 18, 1966 (440-78), granting a "tentative adjournment" of the case to October, 1966, on condition that defendant file daily diary reports on forms prescribed by the Court, stating where he went, whom he met, and what he said.

On April 28, 1966, defendant filed a notice of appeal to the Court of Appeals from the order of April 18. The record was docketed in the Court of Appeals on June 30, 1966.

Upon advice of counsel, defendant did not file the diary forms referred to in the District Court's order. However, no sanctions were ever imposed for his failure to do so, and the issue is now plainly moot.*

The case was adjourned on the District Court calendar to October, 1966. On September 12, 1966, defendant moved

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* Counsel would have argued, *inter alia*, that the District Court's order violated defendant's privilege against self-incrimination and the attorney-client privilege.

for an order indefinitely staying the trial on the ground that his physical condition made it impossible for him to go to trial. His motion was denied on that day.

On September 23, 1966, defendant filed a notice of appeal to the Court of Appeals from the order of September 12.

On September 26, 1966, the Government moved to dismiss both appeals. Defendant opposed the motion and, alternatively, moved for leave to file a petition for a writ of mandamus directing the District Court indefinitely to stay the trial of this case.*

On October 25, 1966, the Court of Appeals filed its memorandum and order dismissing both appeals "on the ground of non-appealability" and denying defendant's motion for leave to file a petition for a writ of mandamus.

It is to review that order that defendant now petitions for a writ of certiorari.

VI

The question of the legality of the District Court's order of April 18, 1966, insofar as it required defendant to keep a daily diary of his activities, is now moot. Apart from that question, however, the two orders appealed from have significance in that they deny defendant's application for an indefinite stay of trial because of his medical condition. The underlying substantive issue, then, is the correctness of the District Court's d termination, on the medical evidence there presented, that trial should not be indefinitely stayed. The procedural issues, in connection with which writ of certiorari is now sought, are whether the Court of Appeals should not have held itself invested with power

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* Defendant also moved to consolidate both appeals.

to review the District Court's orders, and whether, in these circumstances, the Court of Appeals should not have granted defendant's motion for leave to file a petition for a writ of mandamus.

The appealability of the District Court's orders. It is thrice-familiar federal law that, in general, only final orders are appealable. Title 28, United States Code, section 1291.

It is doubly familiar federal law that there is a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). Such orders, though not final, are appealable.

The *Beneficial Loan* doctrine is available in criminal cases. *Stack* v. *Boyle*, 342 U.S. 1, 6 (1951).

If ever there were orders which cried out for review under *Beneficial Loan*, these they are. With a single voice, the doctors say that if defendant is tried, he may die. Suppose the defendant is denied review, and is ordered to trial. Suppose that the doctors' prognostications prove correct, and that he suffers a final heart attack. Would the Court of Appeals then be able to supply a remedy?

In holding the District Court's orders to be non-appealable, the Court of Appeals decided the question of appealability in a way in conflict with applicable decisions of this Court.

The motion for leave to file a petition for a writ of mandamus. The District Court's orders refusing to stay the trial, despite the uncontradicted and overwhelming medical evidence of defendant's disability to go to trial, are

surely a determination so egregiously wrong as to be beyond the District Court's authority. No trial judge can order a man to risk death in order to defend himself against a misdemeanor charge. The Court of Appeals has the power to review such orders by way of extraordinary writ, although it has told the Bar that the better practice is to move, not for issuance of the writ, but for leave to file a petition for the writ. *International Products Corp.* v. *Koons,* 325 F.2d 403 (2d Cir. 1963).

In denying defendant's motion for leave to file a petition for a writ of mandamus, the Court of Appeals sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Dated: New York, New York
November 21, 1966

Respectfully submitted,

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Memorandum

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v—

JOSEPH COLOZZO, et al.,

Appellant.

Before: MOORE, FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeals from order dated April 18, 1966, and from order of September 12, 1966, denying a motion indefinitely to stay the trial, DISMISSED on the ground of non-appealability.

Motion for leave to file a petition for a writ of mandamus DENIED.

Motion to consolidate appeals DENIED.

LPM
HJF
IRK

U.S.C. JJ.

October 25, 1966